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Supreme Court, U.S.
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No. 04-922

IN THE
Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION,
COMMITTEE TO SAVE BUCKNELL WRESTLING,
MARQUETTE WRESTLING CLUB,
YALE WRESTLING ASSOCIATION, AND
COLLEGE SPORTS COUNCIL,

PETITIONERS,

v.

DEPARTMENT OF EDUCATION,

RESPONDENT

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Department argues that petitioners lack standing and a remedy against it. Before the federal merger of law and equity, the Administrative Procedure Act ("APA"), and its 1976 amendments, however, this Court held that "[w]ant of right and want of remedy are justly said to be reciprocal" so that "[w]here... there has been a violation of a right, the person injured is entitled to an action." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). Much has happened since 1938, but nothing has changed: petitioners would have had both a right and a remedy then, and they have both now.

I. PETITIONERS HAVE STANDING

A. Third-Party Tax Cases Are Inapposite. On standing, the Department relies on *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), *Warth v. Seldin*, 422 U.S. 490 (1975), and *Allen v. Wright*, 468 U.S. 737 (1984). Opp'n. at 8-9. Unlike petitioners here, however, the *Simon-Warth-Allen* plaintiffs lacked procedural and unequal-footing injuries. Thus, unlike petitioners here, they could not argue that an order that required the proper procedure or restored equal footing would redress their injuries. *See* Pet. at 17-19 (procedural rights); *id.* at 14-17 (unequal footing). As such, the Department would misplace its reliance on *Simon*, *Warth*, and *Allen*, even if petitioners' procedural-rights and unequal-footing cases did not *post-date* those decisions. Further, as even *Simon* recognizes, privately inflicted injury is traceable to government action if the injurious conduct "would have been illegal without that action." 426 U.S. at 45 n.25. But the *Simon-Warth-Allen* plaintiffs did not allege that the government actions challenged there authorized conduct (*i.e.*, charging hospital fees, exclusionary private schools, residential zoning) that otherwise would be illegal.

The next three sections will establish redressability under the procedural-rights, unequal-footing, and otherwise-illegal theories of standing. Two additional aspects of the Department's *Simon-Warth-Allen* argument warrant rebuttal.

1. The Department argues that schools are "independent actors not before the court[]" that make "unfettered choices" in the "exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." Opp'n. at 8.

That argument is inapposite to "injury produced by determinative or coercive effect upon the action of someone else," Pet. at 13 (*quoting Bennett v Spear*, 520 U.S. 154, 169 (1997)), and for four specific reasons. *First*, given the large number of schools with main or satellite campuses resident in the District, petitioners could hale members' schools into court, if relevant to standing.[1] *Second*, schools are not "unfettered" in acquiescing to the Department's substantively and procedurally unlawful conditions on federal funding. *Id.* at 2-6. *Third*, gender-conscious cuts and caps[2] are not "legitimate" for schools not adjudged to have intentionally discriminated against women athletes. *Id.* at 12-13. *Fourth*, schools' actions are entirely predictable: they will do what they must to qualify for federal funds. Pet. at 15-16. If petitioners prevail and schools persist, petitioners gladly will file complaints against schools under the new regulatory regime, *see Brock*, 477 U.S. at 284 (standing to challenge federal guidelines that govern federal benefit programs), which will work quickly on most schools. U.S. Dep't of Educ., Office for Civil Rights, *Annual Report to Congress: Fiscal Year 2003*, 21 (Dec. 2004) (91% of complaints resolved in 180 days). If schools persist,

2. The Department argues that petitioners must estab-

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[1] The district court denied leave to file an amended complaint in part because of its *sua sponte* argument (not briefed by the parties) that school members were indispensable parties, FED. R. CIV. P. 19, thereby failing the third prong of the associational-standing inquiry, which that court considered a jurisdictional failure to meet Article III standing. App. 77a. *But see Int'l Union v. Brock*, 477 U.S. 274, 287 (1986) (purely legal questions do not require members' participation); *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551-52, 555-56 (1996) ("associational standing test's third prong is a prudential one").

[2] In addition to *cutting* teams, the Three-Part Test has led to *capping* men's team by limiting teams below the coach's otherwise-optimal size to comply with proportionality. App. 252a (¶ 29). Capping affects members generally, *id.*, and specific members, *id.* 274a (¶ 61). Although pleadings alone should suffice, the Department implicitly acknowledges that capping occurs, App. 178a, and indeed capping of men's teams is endemic in college sports. *See* Bill Pennington, *Want to Try Out for College Sports? Forget It*, N.Y. TIMES, Sept. 22, 2002, A1.

lish a "substantial probability" that their prevailing "would likely lead universities... to alter their independent decisions to eliminate or reduce the size of men's wrestling programs." Opp'n. at 9. Even outside the procedural-rights, unequal-footing, and otherwise-illegal contexts, this simply is not the law. *See Pub. Citizen v U.S. Dep't of Justice*, 491 U.S. 440, 451 (1989) ("appellants *might gain significant relief* if they prevail in their suit [and their] *potential gains* are undoubtedly sufficient to give them standing") (emphasis added); *Utah v. Evans*, 536 U.S. 452, 464 (2002) (a "*significant increase in the likelihood* that the plaintiff would obtain relief" from third parties satisfies redressability for an indirect injury) (emphasis added); Pet. at 16-17. The requested relief must have the *potential* to improve petitioners' lot in a significant way. It need not be a sure bet. Moving the equal-opportunity fulcrum from enrollment back to interest would significantly benefit male athletes. *See* n.4, *infra;* Pet. at 15.

1. Procedural Rights. Petitioners allege injury from three procedural violations: failing to follow § 902's presidential-approval requirement, 20 U.S.C. § 1682; voiding the regulatory requirement to assess and consider men's interests, *see* Pet. at 4-6; and amending the regulations without notice-and-comment rulemaking, *id.;* 5 U.S.C. § 553. Petitioners have standing to challenge the denial of required procedures, and that injury remains "fairly traceable" to the procedural violation, notwithstanding that the entity may reach the same result under the proper procedure. Pet. at 17-18 (*citing FEC v. Akins*, 524 U.S. 11, 25 (1998)). Because these procedures are designed "to protect [their] concrete interests," petitioners "can assert th[ese] right[s] without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 & n.7 (1992).

2. Unequal Footing. Under the regulations and cases, Pet. 2-4, the "applicant pool" for intercollegiate athletics consists of those ready and able to compete, based on interest and ability, not all students. *Id.* at 15. The Department's enrollment standard puts male athletes on an unequal footing vis-à-vis female athletes, and restoring the interest-based

standard would redress that injury. *Id.*; *Clinton v. New York*, 524 U.S. 417, 433 & n.22 (1998) (rejects majority's view that indirect-injury plaintiffs cannot assert unequal-footing injuries); Pets.' Suppl. Br. at 7-8.[3] Because men are more interested in competitive athletics,[4] the Three-Part Test is not neutral as applied. *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66-67 (2003) (need not decide at threshold stage whether classification is prohibited as "but proxy for differential treatment" or because it discriminates in practice); *United Auto. Workers v. Johnson Controls*, 499 U.S. 187, 199 (1991).

3. Otherwise-Illegal Conduct. By allowing gender-conscious cuts and caps solely to meet an enrollment quota, App. 178a ("The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test."), without past discrimination, the Department authorizes otherwise-illegal conduct in an overbroad rule that petitioners have standing to challenge facially and as applied. *Civil Rights Cases*, 109 U.S. 3, 14 (1883) (invalidating remedial measure not tied to

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[3] Of the Department's cases, only *Allen* genuinely raises equal-protection issues. Because the plaintiffs wanted an integrated public school, not access to the exclusionary private schools, Pet. at 17 n.11, however, they had to (and did not) establish that (1) absent favorable tax treatment, the schools' funding to decline; (2) the decline would cause the schools either to raise tuition or lower services; (3) increased tuition or lowered services would cause students to leave; (4) the children would enroll in public school rather than move or find another private school. Here, by contrast, Title IX prohibits discrimination by federal recipients, and petitioners can establish that schools would not forego federal funds. *Id.* at 15-16.

[4] Using the aggregate data for schools in the National Collegiate Athletic Association's Division III (which has no scholarships and thus involves participation for its own sake), a school that fields teams in gender-reciprocal sports (baseball-softball, basketball, cross country, golf, gymnastics, hockey, lacrosse, soccer, swimming, tennis, and track), but not in traditionally single-gender sports (field hockey, football, volleyball, and wrestling) would have 183.3 women (44.8%) and 225.8 men (55.2%) in its athletic department, assuming that the 34.7 displaced women (field hockey and volleyball) and 108.9 displaced men (football and wrestling) did not go out for another sport. *See Amici Curiae* Br. of Nat'l Women's L. Ctr. *et al.*, Ex. 12, at 158, 162, No. 02-0072 (D.D.C.).

prior equal-protection violations); Pet. at 12; Pets.' Suppl. Br. at 3-4 (facial challenge); *Reed v. Reed*, 404 U.S. 71, 76 (1971) ("To give a mandatory preference to members of either sex... merely to [eliminate] hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment"); *Craig v. Boren*, 429 U.S. 190, 198 (1976) ("administrative ease and convenience [are insufficient] to justify gender-based classifications"); *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974) ("to conclusively deny one [class] benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment").

Although applying equal-protection principles to gender-segregated teams may be "a most delicate task," *cf. Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996) (race-conscious voting districts), the constitutional, statutory, and regulatory violations become plain when gender becomes "the 'dominant and controlling' consideration," *id.*, as with capping *solely* to meet enrollment ratios. App. 252a (¶ 49); *Truax v. Raich*, 239 U.S. 33, 41 (1915) ("If [a right] could be refused solely upon the ground of [class membership], the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words"); Pet. at 12-13 & n.9 (numerical balance is not an end in itself, and the general population is not the "applicant pool"); *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) ("violate[s] Equal Protection Clause... to base enforcement... on an... arbitrary classification").

Ignoring the requested relief,[5] the panel majority opines

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[5] Petitioners seek (1) a declaration that Title IX authorizes only rules to effectuate its intentional-discrimination standard, prohibits gender-conscious cutting or capping to meet a disparate-impact standard, requires the use of interest (not enrollment) for any authorized gender-conscious decisions, and prohibits capping by defining "opportunity" as "a spot on a team, not an athlete on a team," and (2) an injunction staying the regulations until the Department completes a rulemaking consistent with the declaratory relief. App. 263-64a (¶ 99(A)(1)-(4), (B)(3), (B)(5)).

that Title IX or the regulations *may* authorize or require *some* gender-conscious cuts or caps, even if petitioners prevail, thereby defeating redressability. App. 104-05a, 113a; *but see* 5 U.S.C. § 706 ("the reviewing court shall decide *all* relevant questions of law") (emphasis added). Later, the majority opines that petitioners have an alternate remedy for *Title IX violations. Id.* 115a, 146a (petitioners have alleged "universities' actions... taken in derogation of Title IX"). If petitioners plead Title IX violations sufficiently to trigger § 704, they also establish their standing. *See also* Pets.' Suppl. Br. at 4-5 (supervening decision on pleading standards).

B. "Fact-Bound" Questions Warrant Review. Although fact-bound questions may not warrant review, Opp'n. at 11, this case asks important *legal questions* on how courts treat facts. Petitioners allege (and Appellants' Reply Brief argued) that, contrary to a General Accounting Office ("GAO") conclusion that men's opportunities increased by 36 teams (0.4%) in the 1980s and 1990s, men's teams declined by more than 800. App. 274-75a (¶ 64). Rather than accept the pleadings as true, the majority found GAO's increase "precise" and held that petitioners did not prove causation so clearly that redressability necessarily follows. App. 108-09a. Because GAO compared the teams at 1,185 schools in 1981 with those at 1,319 schools in 1999, a 134-school increase (11.3%), App. 274-75a (¶ 64), the panel majority viewed an 800-plus team *decrease* as a 36-team *increase*, misconstruing the alleged injury and undermining its redressability holding.[6] Pet. at 14. Further, in opposing a future motion to dismiss, petitioners could introduce evidence program, that

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[6] This Court could invoke the primary-jurisdiction doctrine to ask GAO to re-certify its report and methodology. *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673-74 (2003) (Breyer, J., concurring) (primary-jurisdiction "doctrine seeks to produce better informed... legal rulings by allowing courts to take advantage of an agency's specialized knowledge, [and] courts may raise the doctrine on their own motion"). Petitioner College Sports Council ("CSC") has sued GAO for issuing the materially misstated report and for failing to correct it after learning of ongoing reliance on those misstatements. *CSC v. GAO*, No. 03-1911-RBW (D.D.C.).

schools would revise their policies if petitioners prevail, and that petitioners would file administrative complaints on behalf of members against schools that do not revise policies.

II. TITLE IX RULES AND ORDERS SUBJECT TO STATUTORY AND NONSTATUTORY REVIEW

Although the panel majority's adequate-remedy analysis possibly is *dicta, Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1156 (D.C. Cir. 2005) (if appellants lack standing, "[a]ny statements by this Court on the question of the judicial review bar would be unnecessary *dicta.*"), this Court can decide whether 5 U.S.C. § 704 provides an alternate basis to dismiss this action. *Chevron U.S.A. Inc. v. N.R.D.C.*, 467 U.S. 837, 842 (1984) ("Court reviews judgments, not opinions").

A. Title IX Provides Statutory Review. Section 903 provides for judicial review of Title IX rules, regulations, and orders. 20 U.S.C. § 1683. Every prior appellate court to consider the question has determined that this judicial-review language incorporates APA review by statute. Pet. at 22 & n.15 (2nd, 3rd, 6th, and 9th circuits); *Schlafly v. Volpe*, 495 F.2d 273, 282 (7th Cir. 1974). The Department (like the panel majority) dodges petitioners' argument and tackles a straw man: "the reference to agency actions 'made reviewable by statute' in § 704 relates to statutory provisions *other than the APA*." Opp'n. at 12 (quoting App. 117a) (emphasis in original). But no one argues that *the APA* makes Title IX rules and orders reviewable by statute. *Section 903* makes them reviewable by statute. Pet. at 19-22 & nn.12, 14.

B. 1976 Waiver Did Not Narrow Review. The House and Senate reports to the APA's 1976 amendments both "say that 'the time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity.'" *Bowen v. Massachusetts*, 487 U.S. 879, 899 (1988) (citations omitted); *id.* at 900 ("Federal grant-in-aid programs" among cases where "sovereign immunity defense had continued to pose an undesirable bar to consideration of the merits"). Courts should, therefore, read the 1976 amendments consistent with legislative intent *to expand* judicial review. *Bowen*,

487 U.S. at 896-98; *U.S. v. Yellow Cab Co.*, 340 U.S. 543, 554-55 (1951) ("[T]he congressional attitude in [waiving tort immunity] is more accurately reflected by Judge Cardozo's statement [that the] 'exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'"); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) ("realistic assessment of legislative intent" and "interpretation" implies "equitable tolling" in a statute of limitations). Contrary to the clear legislative intent, however, the Department and panel majority read the 1976 amendments *to narrow* previously existing review. Opp'n at 12-13; App. 117-18a.

1. APA Review. Even without Title IX's *statutory* review, the APA's generous *nonstatutory* review would apply to petitioners' programmatic challenge to the Title IX regime. Pet. at 26, 28. As Judge Williams recognized, App. 152a, the Department's agency-inaction cases are irrelevant to judicial review of a final rule or order. *See also* Pet. at 5 n.4 (if not a rule, action was an order). And a "specific *order or regulation*, applying some particular measure across the board... *can of course be challenged under the APA.*" *Id.* at 28 (*quoting Lujan Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990)) (emphasis added).

2. Non-APA Nonstatutory Review. Even without the APA, courts can review executive action taken in excess of authority (*ultra vires*) or in conflict with the Constitution. *Dugan v. Rank*, 372 U.S. 609, 622 (1963) (actions "not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in a particular case, are constitutionally void") (*quoting Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701-02 (1949)). Petitioners credibly argue (and the Department has not even attempted to rebut) that the challenged actions are *ultra vires* and unconstitutional, App. 255-61a (¶¶ 60-93) 281a (¶¶ 103-105); Pet. at 2-6, 12-13, 17-19, thus meeting their burden. Pet. at 24-25; *cf. Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 636-37 (2002) ("inquiry into whether suit lies under *Ex*

parte Young does not include [merits] analysis").

Moreover, the 1946 APA did not eliminate prior forms of nonstatutory review, Pet. at 27, and the 1976 APA amendments did not expand the bar posed by § 704, *id.* at 23 (*citing Darby v. Cisneros*, 509 U.S. 137, 153 (1993)). Petitioners cite several non-APA bases for judicial review, Pet. at 22-26, which the Department does not attempt to rebut by anything other than § 704.[7] Because petitioners could bring this action *without the APA*, however, § 704 can pose no bar here.

C. **Enforcement Remedy Is Inadequate**. Although claiming that the panel majority considered the adequacy of the alternate remedy, Opp'n at 17, the Department ignores *at least* five inadequacies of private Title IX enforcement actions: (1) some of petitioners' members never had a timely enforcement action against their school's cutting men's teams, Pet. at 29-30; (2) as-yet uncut teams and uncapped athletes have no Title IX action, and a subsequently arising action against a school does not displace an equitable action against the Department, *id.* at 27; (3) school members have no alternate remedy whatsoever, *id.* at 30; (4) petitioners cannot enforce the regulatory requirement to measure and consider men's interest, Pets.' Suppl. Br. at 5-6; (5) petitioners' members wish to file administrative complaints, and (although doing so is futile now) they would do so if the Department changed its rules, *id.* at 3; Pet. at 28-29.

CONCLUSION

As set forth above, petitioners have both a right and a remedy against the Department. But if it finds the requested relief insufficient to move schools to alter their behavior, this

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[7] The Department does protest that an officer suit is merely "another way of pleading" against an entity, Opp'n at 12-13 (*quoting Kentucky v. Graham*, U.S. 473 U.S. 159, 165 (1985)), without acknowledging that "official-capacity actions for prospective relief [are not] against the [sovereign]." Pet. at 24 n.17 (*quoting Graham*, 473 U.S. at 167 n.14). The Department's facile point is thus incomplete: the question is not whether an officer suit is a different form of pleading. It obviously is. The question is whether it is a difference with a distinction. Petitioners (and centuries of history) argue that it is. Pet. at 22-26; *see* Pets.' Suppl. Br. at 8-9 (naming officer).

Court easily can remand this action to the judicial districts for the named schools (*i.e.*, Connecticut, Pennsylvania, Wisconsin, and Illinois). 28 U.S.C. § 2106. The Second, Third, and Seventh Circuits all recognize that § 903 provides judicial review of Title IX rules and orders, and the district courts there could - even without joining the schools as parties - fashion injunctive relief to ensure that the schools comply with the Title IX regime under petitioners' requested relief. 28 U.S.C. § 1651(a). For schools generally and Yale specifically, *see* Pet. at 15-16, this Court can be certain that the schools would cease capping and move the equal-protection fulcrum from enrollment back to interest. Even if it does not restore a single lost team, it will save at-risk teams and redress the equal-protection injuries of both cut and at-risk teams alike.

May 9, 2005

Respectfully submitted,

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APPENDIX

(Continued)

Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WRESTLING COACHES ASSOCIATION,
1976 Auction Road
Manheim, PA 17545,

* * *

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION,
400 Maryland Avenue, SW
Washington, DC 20202,

SECRETARY OF EDUCATION,
400 Maryland Avenue, SW
Washington, DC 20202,

and

ASSISTANT SECRETARY OF EDUCATION OF CIVIL RIGHTS,
400 Maryland Avenue, SW
Washington, DC 20202,

Defendant.

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The National Wrestling Coaches Association ("NWCA"), the Committee to Save Bucknell Wrestling ("Bucknell Wrestling"), the Marquette Wrestling Club ("Marquette Wrestling"), the Yale Wrestling Association ("Yale Wrestling"), and the College Sports Council ("CSC"),

plaintiffs in the above-captioned action, seek declaratory and injunctive relief based on the following allegations.

NATURE OF THE ACTION

1. Plaintiffs bring this action to protect intercollegiate and scholastic athletic opportunities and teams from further elimination, and to restore such opportunities and teams previously eliminated, as the direct and indirect result of the unlawful rules that the United States Department of Education ("Department"), Secretary of Education, and Assistant Secretary of Civil Rights (collectively, "USDE") have issued under the color of implementing Title IX of the General Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688 (2000) ("Title IX").

* * *

3. Plaintiffs seek declaratory and injunctive relief to compel USDE to comply with the Equal Protection component of the Due Process Clause, U.S. CONST. amend. V, the discrimination prohibitions of Title IX, 20 U.S.C. §§ 1681-1682, and the rulemaking requirements of both Title IX, 20 U.S.C. § 1682, and the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (2000) ("APA"). As set forth more fully below, Plaintiffs seek the following declaratory and injunctive relief:

* * *

(c) a declaratory judgment that, in authorizing intentional discrimination under the unlawful Title IX rules, USDE has consciously and expressly adopted a general policy that abdicates the statutory duty to prevent discrimination and to issue rules, regulations, and orders that effectuate Title IX's prohibition against intentional discrimination;

* * *

PARTIES

4. Plaintiff NWCA, incorporated under the laws of Iowa and headquartered in Manheim, Pennsylvania, is a not-for-profit corporation dedicated to the advancement of the sport of wrestling, primarily at the scholastic and collegiate levels. NWCA's members include both natural persons (such as scholastic and collegiate coaches, alumni, and the general public) and organizations (such as federally funded colleges and universities (collectively hereinafter, "institutions"), federally funded secondary schools, athletic associations, and save-our-sport groups). NWCA's members include federally funded colleges, universities, high schools, and associations of high schools that are directly affected by the Title IX rules challenged in this action. See Ex. A(declaration of Patrick A. Tocci, II). NWCA's athletic-association members include associations with high school and collegiate athlete-members and state high school athletic associations. NWCA's members have ongoing legal, educational, professional, economic, and aesthetic interests in collegiate and scholastic wrestling, which interests have been harmed and restricted (and continue to be harmed and restricted) by USDE's unlawful Title IX rules. Plaintiff NWCA receives membership dues from its members. The number of dues-paying members decreases when institutions (at scholastic or collegiate level) discontinue their wrestling program. See id.

* * *

8. Plaintiff CSC, incorporated under the laws of the District of Columbia and headquartered in Washington, D.C., is a not-for-profit corporation serving as an umbrella group for organizations representing the interests of

collegiate coaches and athletes. CSC members include, without limitation, the nationwide collegiate coaches associations for men's and women's swimming (College Swimming Coaches Association of America), men's and women's track and field (United States Track Coaches Association), men's wrestling (NWCA), and men's gymnastics (College Gymnastics Association). The individuals and institutions that are members of CSC's member organizations have educational, professional, economic, participatory, aesthetic, and spectator interests in intercollegiate swimming, track and field, wrestling, gymnastics, and other sports. These interests have been harmed (and continue to be harmed) by the elimination of intercollegiate sports opportunities and teams that result from institutions' efforts to comply with USDE's unlawful Title IX rules.

9. Defendant Department, headquartered in the District of Columbia, is an executive department of the United States government. Congress has empowered the Department to extend federal financial assistance to educational programs and activities. Defendants Secretary and Assistant Secretary of Civil Rights are officers of the Department, 20 U.S.C. §§ 3411, 3412(b)(1)(E), named as defendants in their official capacity.

JURISDICTION AND VENUE

10. This case arises out of USDE's violation of Sections 901 and 902 of Title IX, 20 U.S.C. §§ 1681, 1682, Section 4 of the APA, 5 U.S.C. § 553, and the Equal Protection component of the Due Process Clause, U.S. CONST. amend. V. Plaintiffs' claims, therefore, raise federal questions and questions of civil rights under acts of Congress, over which this Court has jurisdiction pursuant to

28 U.S.C. §§ 1331, 1343(a)(4), 1346(a)(2), 1361 (2000), the Acts of March 3, 1863, 12 Stat. 762, and June 25, 1936, 49 Stat. 1921 (as amended), and D.C. Code § 11-501.

* * *

STATUTORY BACKGROUND

* * *

20. On February 11, 1984, the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984) (hereinafter, Grove City), held that Title IX extended only to the educational programs and activities that directly received federal funds.

21. In the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988) ("CRRA"), Congress extended the reach of Title IX to all of a school's educational programs and activities if any of the school's educational programs and activities received federal funds. The CRRA authorized federal funding agencies to issue rules, regulations, and orders of general applicability under 20 U.S.C. § 1682 to apply to such educational programs and activities that do not directly receive federal funding, but CRRA did not extend the scope of any rules, regulations, or orders issued under the pre-CRRA Title IX.

REGULATORY BACKGROUND

1975 HEW Regulations

* * *

26. Under the regulations as promulgated, "level of competition" refers to the type of team offered (i.e., intramural, club, intercollegiate/interscholastic varsity) and "selection of sports" refers to the sport offered (e.g., track and field, gymnastics, swimming).

* * *

1979 HEW Policy Interpretation

* * *

36. With regard to selecting the level of competition (i.e., determining whether to field intramural, club, or intercollegiate varsity teams), the 1979 Policy Interpretation does not require institutions to upgrade teams to intercollegiate status absent a "reasonable expectation" that intercollegiate competition will be available in the institution's normal competitive region. When opportunities for a gender have been limited, however, the 1979 Policy Interpretation may require the institution to encourage development of competition in the region.

* * *

Formation of USDE and the 1980 USDE Regulations

* * *

42. USDE prepared enforcement manuals in 1980 and 1990, but neither published them in the Federal Register nor sought or received approval from the Office of the Federal Register to incorporate them by reference in the Federal Register.

* * *

1996 USDE Clarification

* * *

52. The 1996 Clarification was USDE's first public announcement that USDE had extended the Three-Part Test to interscholastic athletic programs.

53. The 1996 Clarification was USDE's first post-Grove City public announcement that the Three-Part Test applied to athletic departments that do not directly receive federal funds.

54. The third prong of the Three-Part Test described in the 1996 Clarification differs from the that described in USDE's 1980 Title IX Intercollegiate Athletics Investigator's Manual. Specifically, in 1980, USDE interpreted prong three to mean that a school must accommodates the underrepresented gender's interest "to the same degree that it accommodates the interests . . . of the other gender." In the 1996 Clarification, USDE published a change in the inquiry of prong three to whether the underrepresented gender has "(a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team."

55. USDE neither published the 1996 Clarification in the Federal Register nor sought or received approval from the Office of the Federal Register to incorporate the 1996 Clarification (or the September 20, 1995 draft clarification) by reference in the Federal Register.

56. In the 1995-96 Clarification process, USDE did not follow any procedure that USDE previously had published in the Federal Register pursuant to 5 U.S.C. § 552(a)(1)(C).

* * *

Post-1996 Enforcement

58. Since January 16, 1996, USDE has conducted the inspection, enforcement, and oversight of intercollegiate and interscholastic athletics using the 1979 Three-Part Test, as revised by the 1996 Clarification.

59. Since January 16, 1996, USDE has initiated investigations at institutions where athletic participation rates did not match enrollment rates by gender, but where no student had alleged discrimination.

60. Pursuant to the Three-Part Test, as revised by the 1996 Clarification, since January 16, 1996, USDE has negotiated and monitored compliance agreements with institutions. As a result of such actions, the institutions reduced male participation opportunities through gender-conscious cutting and capping of men's athletic opportunities.

61. On information and belief, on or about January 5, 2000, USDE negotiated and entered into a compliance agreement with Northwestern University that requires Northwestern either to meet prong one of the Three-Part Test (enrollment proportionality) by June 30, 2002 or to conduct a survey of the interests and abilities of female (but not male) students to demonstrate compliance with the Three-Part Test, as revised by the 1996 Clarification. Ex. B (copy of compliance agreement from Department's internet site). As a result of the compliance agreement, with USDE's knowledge, monitoring, and assent, Northwestern has imposed caps on men's teams that affect members of Plaintiffs NWCA and CSC, including without limitation the men's swimming and wrestling coaches at Northwestern.

Effects of 1979 Policy Interpretation and 1996 Clarification

62. USDE's unlawful Title IX policies directly and indirectly have reduced (and continue to limit and to reduce) participation opportunities for male athletes.

63. Seeking to avoid such USDE enforcement actions, institutions have limited male participation opportunities to comply with USDE's unlawful Title IX policies.

64. As a direct and indirect result of USDE's unlawful Title IX policies, therefore, institutions (including institutions that are members of Plaintiffs and those that are

the actual or prospective employer or alma mater of members of Plaintiffs) have cut hundreds of men's teams and have capped hundreds of men's participation opportunities. See, e.g., U.S. General Accounting Office, "Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams," at 18 (March 2001) (one third of institutions acknowledged cutting teams to comply with gender equity goals or requirements) ("GAO Study"). According to the GAO Study, the number of schools in the National Collegiate Athletic Association ("NCAA") and the National Association of Intercollegiate Athletics ("NAIA") increased by 134 (from 1,185 to 1,319) between 1981-82 and 1998-99. Id. at 32.[22] During the same period, the total number of men's teams increased by only 36. With an average of approximately seven teams per school, these changes represent a loss of more than 800 men's teams during the 1980s and 1990s.

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[2] In 1981-82, NCAA had 787 members, NAIA had 515 members, and 117 were in both the NCAA and NAIA. Id. at 32. The GAO's 1981-82 survey included 1,185 schools (787 + 515 - 117). Similarly, in 1998-99, NCAA had 1,041 members, NAIA had 339 members, and 61 were in both NCAA and NAIA. Id. The GAO's 1998-99 survey covered 1,319 schools (1,041 + 339 - 61).

65. As the direct and indirect result of USDE's unlawful Title IX policies, under the euphemism "roster management," members of Plaintiff NWCA and members of Plaintiff CSC's members have been forced to serve (and continue to be forced to serve) as the involuntary participants who implement USDE's unlawful Title IX policies by capping athletes solely to achieve the quotas established pursuant to USDE's unlawful Title IX rules.

66. By press release dated May 2, 2001, Bucknell announced that it would discontinue intercollegiate wrestling starting with the 2002-03 season to bring Bucknell into compliance with Title IX. The press release notes that, although Bucknell offered 14 men's teams and 14 women's teams in 2001-02, women comprised 48.7 percent of enrolled students, but only 41.9 percent of student-athletes. A companion Bucknell question-and-answer document cites Title IX's proportionality requirements as Bucknell's reason for eliminating the wrestling team. Ex. C (Bucknell University Moving Forward with Gender Equity Plan (May 2, 2001)).

67. On June 15, 2001, Marquette announced that it would discontinue the privately financed Marquette wrestling team in order to achieve compliance with USDE's Title IX policies. Ex. D (Marquette to Discontinue Sponsorship of Wrestling As An Intercollegiate Sport (June 17, 2001)). Marquette had cut the program's funding after the 1992-93 academic year. Between the 1993-94 and 2000-01 academic years, Plaintiff Marquette Wrestling had supported the Marquette wrestling program through its private fundraising efforts, without Marquette's financial support. At a Marquette Wrestling dinner commemorating the end of the 52-year history of Marquette's wrestling

program. Marquette's athletic director indicated that Marquette might bring back its wrestling program if the legal requirements changed.

68. At the end of the 1990-91 academic year, Yale decided to demote its intercollegiate varsity wrestling team to "club" status, citing budgetary reasons. To avert this demotion, Yale Wrestling offered to endow the Yale wrestling program to allow wrestling to continue at Yale despite the budget cuts. On information and belief, Yale declined to accept the endowment because of Title IX.

69. In 1999, Miami University eliminated its wrestling, tennis, and soccer teams to comply with USDE's proportionality requirements. Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 610-11 (6th Cir. 2002).

70. In or about 1996, Illinois State University eliminated its wrestling and soccer teams to comply with USDE's proportionality requirements. Boulahanis v. Board of Regents, 198 F.3d 633, 635-36 (7th Cir. 1999).

71. Institutions, athletic directors, and coaches that are members of Plaintiff NWCA or members of Plaintiff CSC's members and that provide or participate in providing athletic opportunities must engage in intentional discrimination (gender-conscious cutting and capping) in violation of Title IX in order to comply with USDE's disparate-impact standard (the Three-Part Test) and with USDE-negotiated settlements. Because they cannot sue themselves, they cannot obtain an adequate remedy in any other challenge to USDE's Title IX rules.

72. The injunctive and declaratory relief requested in paragraph 126, infra, will redress the injuries alleged herein by eliminating the USDE's unlawful Title IX rules and thereby restoring the statute's protections against

intentional gender-conscious discrimination, 20 U.S.C. § 1681, and the regulations' requirement that institutions provide equal opportunity (not equal participation) based on interest and abilities (not enrollment). 45 C.F.R. § 86.41(c)(1). The injunctive and declaratory relief are necessary to restore the rights of men and women to an equal footing in the allocation of athletic opportunities.

73. Enforcement actions brought against schools do not provide an adequate remedy for student-athletes because schools typically announce cutting and capping decisions in the Spring after the deadline for applying to transfer. See, e.g., Ex. C (Bucknell University), D (Marquette University). Cutting and capping decisions often come after the schools that still may accept transferees for the next year have allocated their scholarships. As a result, when a school makes a cut or announces capping, student-athletes do not have an opportunity to seek other opportunities.

74. Declaratory relief is inadequate to remedy Plaintiffs' injury because USDE's Three-Part Test, as revised by the 1996 Clarification, serves as a substantial factor motivating schools' decisions to cut or cap men's athletic opportunities. See, e.g., Ex. C (Bucknell University), D (Marquette University). Because USDE's Three-Part Test has become synonymous with "gender equity," see, e.g., Ex. C (Bucknell University), failure to meet the Three-Part Test is equated with gender inequity, and thus tarnishes the institution's reputation, notwithstanding that a school in fact may comply with the regulatory standard (equal opportunity based on interest). As long as it remains extant as an influential document of the agency responsible for much of schools' federal funding, therefore, the Three-Part

Test will remain a substantial factor in schools' decisions on what athletic opportunities to provide.

USDE'S 1996 CLARIFICATION RENDERS THE 1979 POLICY INTERPRETATION SUBJECT TO RENEWED JUDICIAL REVIEW

* * *

79. Although the Three-Part Test in the 1979 Policy Interpretation did not apply by its terms to interscholastic athletic programs and neither the 1995 draft clarification nor the final 1996 Clarification published any data or made any findings that discrimination exists at the interscholastic level, the 1996 Clarification extends the scope of the Three-Part Test to interscholastic athletics. Accordingly, USDE's 1996 Clarification revealed an aspect of the Three-Part Test that was unforeseeable in 1979, thereby reopening the 1979 Policy Interpretation to judicial review.

80. Although USDE previously memorialized and followed an interpretation of the third prong (fully accommodating the interests of the underrepresented gender) that required accommodating the underrepresented gender's interest to the same extent as the school accommodated the other gender's interest, the 1996 Clarification changed the analysis to one based solely on the accommodation of the interests of the underrepresented gender, without regard for the degree of accommodation of the other gender. Accordingly, USDE's 1996 Clarification changed the interpretation of an aspect of the Three-Part Test, thereby reopening the 1979 Policy Interpretation to judicial review.

* * *

III.
USDE UNLAWFULLY DENIED PETITIONS TO AMEND OR REPEAL THE "THREE-PART TEST"

* * *

99. In the 1995-96 Clarification process, USDE neither followed existing Department procedures published previously in the Federal Register nor published Clarification-specific procedures in the Federal Register.

* * *

IV.
USDE'S GENDER PROPORTIONALITY RULES ARE ULTRA VIRES AND AN ABDICATION OF THE STATUTORY DUTY TO ISSUE RULES, REGULATIONS, AND ORDERS TO EFFECTUATE TITLE IX'S PROHIBITION OF INTENTIONAL GENDER DISCRIMINATION AND TO FOLLOW APA-MANDATED PROCEDURES

* * *

103. By adopting a disparate-impact standard for athletics (namely, the Three-Part Test, as revised by the 1996 Clarification) that authorizes intentional discrimination, USDE acted (and continues to act) ultra vires and in violation of the ongoing duty to issue rules, regulations, and orders to effectuate the Title IX's prohibition of intentional gender discrimination.

104. By adopting such disparate-impact standard for athletics without following APA-mandated procedures, USDE acted (and continues to act) ultra vires and in violation of the Due Process Clause's Equal Protection component, Title IX, and the APA.

105. By countenancing gender-conscious capping and cuts by recipients of federal funds in violation of the equal-opportunity regulations and Title IX, including such gender-conscious measures in settlements to USDE-initiated and USDE-monitored investigations, and in issuing the 1996 Clarification, USDE has acted ultra vires and has "consciously and expressly adopted a general policy" that abdicates statutory duties under Title IX.

* * *

VII
AS AN INTERPRETIVE RULE PURPORTING TO AMEND A SUBSTANTIVE RULE AND PRIOR REGULATORY INTERPRETATION, THE 1996 CLARIFICATION IS NULL AND VOID

* * *

121. By its terms, the 1979 Three-Part Test did not apply to interscholastic athletic programs. In the 1996 Clarification, USDE amended the Three-Part Test to apply to interscholastic athletics.

122. In the Department's 1980 enforcement manual (Title IX Intercollegiate Athletics Investigator's Manual), the third prong of the Three-Part Test (fully accommodating the interests of the underrepresented gender) required schools to assess whether they accommodated the underrepresented gender's interest to the same extent as they accommodated the other gender's interest. In the 1996 Clarification, USDE amended the third prong of the Three-Part Test to refer only to whether the interests of the underrepresented gender were fully accommodated, with no regard for whether the interests of the other gender also were fully accommodated.

* * *

PRAYER FOR RELIEF

126. Wherefore, Plaintiffs respectfully request that this Court enter the following relief:

A. Pursuant to 5 U.S.C. § 706(2), 28 U.S.C. §§ 1331, 1343(a)(4), 1346(a)(2), 1361, 2201-2202, the Acts of March 3, 1863, 12 Stat. 762, and June 25, 1936, 49 Stat. 1921 (as amended), D.C. Code § 11-501, Fed. R. Civ. Proc. 57, and the court's equitable powers, a Declaratory Judgment that:

* * *

(7) In the 1996 Clarification, USDE acted ultra vires under both Title IX and the APA by consciously and expressly adopting a general policy that abdicates the statutory duty to issue rules, regulations, and orders to effectuate Title IX's prohibition of intentional gender discrimination without following APA-mandated procedures;

* * *

B. Pursuant to 5 U.S.C. § 706(2), 28 U.S.C. §§ 1331, 1343(a)(4), 1346(a)(2), 1361, 2202, the Acts of March 3, 1863, 12 Stat. 762, and June 25, 1936, 49 Stat. 1921 (as amended), D.C. Code § 11-501, and the court's equitable powers, an Order providing that

(1) USDE's 1996 Clarification is vacated in its entirety as arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, in excess of the authority provided to USDE by Congress, and promulgated without observing the procedures required by law;

(2) The Three-Part Test is vacated as arbitrary, capricious, an abuse of discretion, not otherwise

in accordance with the law, in excess of the authority provided to USDE by Congress, and promulgated without observing the procedures required by law;

* * *

(5) USDE's Title IX rules with respect to athletic opportunities are stayed until USDE promulgates a final rule pursuant to this Court's order and until such rules become effective pursuant to 20 U.S.C. § 1682.

C. Pursuant to 42 U.S.C. § 1988(b) (1994) and 28 U.S.C. § 2412 (1994), award Plaintiffs their costs, including attorneys fees.

D. Such other relief as may be just and proper.

Dated: Oct. 28, 2002 Respectfully submitted,

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